PUSAT BANDAR DAMANSARA SDN BHD & ANOR

v.

YAP HAN SOO & SONS SDN BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-02-609-1998]
8 DECEMBER 1999

CONTRACT: *Sale and purchase of land - Breach - Termination provision - Whether agreement could only be terminated by vendor - Repudiation of agreement by purchaser - Whether of no effect - Items of loss claimed by vendor - Whether deductible and forfeitable under agreement - Whether purchaser to bear losses*

CONTRACT: *Sale and purchase of land - Breach - Whether agreement properly terminated by vendor - Extra interest and penalty - Imposition of - Whether extra interest and penalty validly imposed - Whether allowed by agreement - Section 75 Contracts Act, 1950 - Applicability*

By a sale and purchase agreement dated 15 June 1983 ('the agreement') the appellants sought to sell an office block in Damansara Town Centre to the respondent for RM766,789.10. The agreement *inter alia* provided that the appellants could terminate the agreement for any breach committed by the respondent, and could also impose extra interest and penalty charges for such breach. The respondent paid a down payment of RM231,789.10 for the purchase but failed to pay the instalments and other charges.

On 4 February 1986 the respondent wrote to the appellants admitting that it had committed a breach under the agreement and invited the appellants to terminate the agreement. The appellants replied by letter dated 18 February 1986 stating that they would accept the offer to terminate upon payment of RM8,699.20. The respondent, however, did not pay the sum in question.

On 16 July 1990 the appellants terminated the agreement and sued for the balance sum of RM634,763.99. The respondent claimed that it was required to take a loan from the appellants to pay the balance price, and, as the appellants were not licenced moneylenders, the agreement contravened the Moneylenders Ordinance 1951 and was on that score null and void. Alternatively, the respondent contended that it had repudiated the agreement on 18 February 1986, and arising from that, the appellants could only forfeit

RM76,678.91 being 10% of the purchase price and ought to refund the balance of the down payment. The respondent, in the result, counterclaimed for RM155,110.19 being the said refundable balance.

The learned trial judge ruled that: (i) the agreement was not caught by the Moneylending Ordinance 1951 and was hence valid and binding; (ii) the respondent had effectively terminated the agreement on 18 February 1986 and the appellants could only forfeit 10% of the purchase price from the initial payment; and (iii) the appellants' claim was unmaintainable as the appellants had charged a total of 32% interest on the balance of the purchase price. It was further ruled, in any event, that the rate of default interest imposed on the outstanding instalments was a penalty and it was therefore caught by s. 75 of the Contracts Act 1950. The learned judge in the circumstances allowed the appellants' claim only in the sum of RM115,050.20, which was to be deducted from the initial payment of RM231,789.10, and ordered for the balance to be paid to the respondent as respondent's counterclaim. The learned judge then dismissed the appellants' claim and allowed the respondent's claim, whereupon the appellants appealed.

Held:
Per Siti Norma Yaakob JCA

[1] The transaction involved the sale and purchase of property and had nothing to do with a money lending transaction.

[2] The learned judge had misdirected himself when he fixed 18 February 1986 as the date for the termination of the agreement. The agreement gave the right to terminate solely to the first appellant and did not allow the respondent to terminate it. Therefore, the purported termination by the respondent was of no effect and the agreement continued to be good and binding. There was, in any case, no acceptance by the appellants of the intended termination and this was clear from the letter of 18 February 1986.

[3] It was only on 16 July 1990 that the appellants terminated the agreement. It was based on this termination, which was validly exercised, that the appellants had computed their loss of RM634,763.99 as claimed in their statement of claim.

[4] As the balance purchase price had not at all been paid by the respondent, the respondent cannot object to the imposition of the 13% interest as that was the rate of interest agreed upon default under the agreement. Likewise, the imposition of 19% interest was allowed by the agreement. In any case, to bring the 19% interest within the ambit of s. 75 of the Contracts Act 1950, it must first be shown that it was excessive in nature. The fact that

it was an agreed penalty interest as opposed to one that was fixed unilaterally by the appellants lends support to the conclusion that it could not have been that excessive. Under the circumstances, that rate of interest cannot be caught by s. 75.

[5] As all the four items of loss claimed by the appellants are deductible and forfeitable under the agreement, it follows that their claim for RM634,763.99 has been made out after due credit has been given to the total sum received as initial payments under the agreement.

Per Mokhtar Sidin JCA

[1] The learned judge came to the correct conclusion when he found that this was not a loan. The transaction was clearly not a loan transaction.

[2] The learned judge erred when he held that the agreement was terminated on 18 February 1986. The defaults were committed by the respondent, and under the agreement, only the appellants have the right to terminate the agreement. It is obvious from the appellants' reply of 18 February 1986 that the appellants did not accept the respondent's invitation to terminate the agreement. At the most the reply only conveyed a conditional acceptance or a counter offer by the appellants that they would accept the offer to terminate on payment of RM8,669.20.

[3] Since the respondent has no right to repudiate the agreement, and since the appellants did not accept the repudiation, the agreement survived. That being the case the appellants were entitled to the sums due under the agreement at the time they terminated the agreement.

[4] The agreement was only terminated on 16 July 1990 when the appellants gave notice to terminate the agreement for the breach committed by the respondent. As such the appellants were entitled to all the sums due under the agreement from the respondent as of 16 July 1990. This is precisely the claim by the appellants in their statement of claim.

[5] The learned judge had erred in his application of s. 75 of the Contracts Act 1950. The agreement has provided for penalty to be imposed for any breach committed by the respondent, and clearly the extra 13% interest imposed on the balance of the purchase price was such a penalty. Also, the amount claimed for penalty did not exceed the amount provided for by the agreement. The appellants were therefore entitled to impose the penalty until the date of termination and the learned judge had erred in rejecting the claim.

[Appeal allowed; judgment for appellants; respondent's counterclaim dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Melalui suatu perjanjian jual beli bertarikh 15 Jun 1983 ('perjanjian') perayu menjual satu blok pejabat di Pusat Bandar Damansara kepada responden dengan harga RM766,789.10. Perjanjian antara lain memperuntukkan bahawa perayu berhak menamatkan perjanjian jika berlaku kemungkiran oleh responden dan boleh juga mengenakan faedah tambahan dan penalti atas kemungkiran sedemikian. Responden membayar cengkeram sebanyak RM231,789.10 bagi pembelian tersebut tetapi gagal membayar bayaran ansuran dan bayaran-bayaran lain.

Pada 4 Februari 1986 responden menulis kepada perayu mengaku melakukan kemungkiran perjanjian dan meminta perayu menamatkan perjanjian. Melalui surat bertarikh 18 Februari 1986 perayu menyatakan bahawa mereka akan menerima tawaran untuk menamatkan perjanjian jika responden membayar sebanyak RM8,669.20. Responden bagaimanapun tidak membayar wang yang dipinta itu.

Pada 16 Julai 1990 perayu menamatkan perjanjian dan menuntut baki harga berjumlah RM634,763.99. Responden mengatakan bahawa mereka dikehendaki supaya mengambil pinjaman dari perayu untuk membiayai pembelian, dan oleh kerana perayu bukanlah pemberipinjam wang yang berlesen, maka perjanjian telah melanggar Ordinan Pemberipinjam Wang 1951 yang berakibat ianya menjadi tak sah dan batal. Secara alternatifnya, responden berhujah bahawa mereka telah menolak perjanjian pada 18 Februari 1986, dan akibatnya perayu hanya berhak merampas RM76,678.91 yang merupakan 10% dari harga belian dan harus mengembalikan baki cengkeram. Responden berikutnya membuat tuntutan balas sebanyak RM155,110.19 iaitu baki yang perlu dikembalikan.

Hakim bicara bijaksana memutuskan bahawa: (i) perjanjian tidak dirangkum oleh Ordinan Pemberipinjam Wang 1951 dan perjanjian dengan itu sah dan mengikat; (ii) responden telah dengan berkesannya menamatkan perjanjian pada 18 Februari 1986 dan perayu hanya boleh merampas 10% harga belian yang ditolak dari bayaran cengkeram; dan (iii) tuntutan perayu tidak dapat dipertahankan kerana perayu mengenakan faedah terkumpul 32% ke atas baki harga belian. Ianya diputuskan selanjutnya bahawa kadar faedah kerana mungkir yang dikenakan ke atas ansuran yang tertunggak adalah satu penalti dan dengan itu dirangkum oleh s. 75 Akta Kontrak 1950. Hakim bijaksana dengan hal yang demikian membenarkan tuntutan perayu hanya setakat RM115,050.20, yang ditolak dari wang cengkeram sebanyak RM231,789.10, dan memerintahkan bakinya dikembalikan kepada responden. Hakim bijaksana kemudian menolak tuntutan perayu dan membenarkan tuntutan balas responden, ekoran mana perayu telah merayu.

Diputuskan:
Oleh Siti Norma Yaakob HMR

[1] Transaksi melibatkan satu jual beli hartanah dan tidak kena mengena dengan transaksi peminjaman wang.

[2] Hakim bijaksana telah tersalah arah dirinya bilamana menetapkan 18 Februari 1986 sebagai tarikh penamatan perjanjian. Perjanjian memberi hak menamatkan hanya kepada perayu pertama dan tidak membenarkan responden berbuat demikian. Dengan demikian, penamatan yang dikata sebagai telah dibuat oleh responden itu tidak berkesan dan perjanjian terus menjadi sah dan mengikat. Walau apapun, tiada penerimaan di pihak perayu akan hasrat untuk menamatkan perjanjian dan ini jelas dari surat bertarikh 18 Februari 1986.

[3] Ianya hanyalah pada 16 Julai 1990 perjanjian ditamatkan oleh perayu. Ianya berdasarkan kepada penamatan ini, yang dilaksanakan dengan sahnya, bahawa perayu membuat pengiraan jumlah kerugian sebanyak RM634,763.99 sepertimana yang tertera dalam pernyataan tuntutan mereka.

[4] Oleh kerana baki harga belian tidak langsung dibayar oleh responden, responden tidak boleh membantah pengenaan faedah 13% kerana itulah kadar yang dipersetujui jika berlaku kemungkiran di bawah perjanjian. Begitu juga, pengenaan 19% faedah adalah dibenarkan oleh perjanjian. Walau apapun, untuk membawa faedah 19% ke dalam batasan s. 75 Akta Kontrak 1950, terlebih dahulu ianya hendaklah ditunjukkan sebagai terlampau tinggi. Fakta bahawa ianya adalah penalti yang dipersetujui, dan bukannya sesuatu yang diputuskan secara sebelah pihak oleh perayu, menunjukkan bahawa kadar tersebut bukan sesuatu yang 'excessive'. Dalam halkeadaan sedemikian, kadar faedah tersebut tidak boleh dirangkum oleh s. 75.

[5] Oleh kerana ke empat-empat item kerugian yang dituntut oleh perayu sememangnya boleh ditolak dan dirampas di bawah perjanjian, ianya mengikut bahawa tuntutan mereka sebanyak RM634,763.99 telah dibuktikan selepas diambilkira jumlah yang diterima sebagai cengkeram di bawah perjanjian.

Oleh Mokhtar Sidin HMR

[1] Hakim bijaksana mencapai keputusan yang betul bilamana beliau memutuskan bahawa ini bukanlah suatu pinjaman. Jelas transaksi di sini bukan transaksi pinjaman.

[2] Hakim bijaksana khilaf bila memutuskan bahawa perjanjian telah ditamatkan pada 18 Februari 1986. Kemungkiran dilakukan oleh responden dan di bawah perjanjian hanya perayu berhak untuk menamatkan perjanjian. Adalah jelas dari jawapan perayu pada 18 Februari 1986 bahawa perayu tidak menerima tawaran untuk menamatkan perjanjian. Paling boleh dikatakan, jawapan tersebut hanya merupakan penerimaan bersyarat atau tawaran balas oleh perayu bahawa mereka akan menerima tawaran untuk menamatkan perjanjian jika dibayar RM8,669.20.

[3] Oleh kerana responden tiada hak untuk menamatkan perjanjian, dan oleh kerana perayu tidak menerima penolakan, perjanjian wujud terus. Dengan hal yang demikian, perayu berhak kepada jumlah yang terhutang di bawah perjanjian pada waktu mereka menamatkan perjanjian.

[4] Perjanjian hanya ditamatkan pada 16 Julai 1990 apabila perayu memberi notis untuk menamatkan perjanjian kerana kemungkiran yang dilakukan oleh responden. Dengan yang demikian, perayu berhak kepada semua jumlah yang menjadi terhutang di bawah perjanjian setakat 16 Julai 1990. Inilah sebenarnya yang dituntut oleh perayu dalam pernyataan tuntutan mereka.

[5] Hakim bijaksana telah khilaf dalam menggunapakai s. 75 Akta Kontrak 1950. Perjanjian telah memperuntukkan bahawa penalti boleh dikenakan atas kemungkiran yang dilakukan oleh responden, dan tambahan faedah 13% yang dikenakan kepada baki harga belian jelas merupakan penalti yang dikatakan tersebut. Juga, jumlah yang dituntut untuk penalti tidak melebihi jumlah yang diperuntukkan oleh perjanjian. Dengan keadaan ini, perayu berhak untuk mengenakan penalti sehingga tarikh penamatan dan hakim bijaksana telah silap kerana menolak tuntutan tersebut.

[Rayuan dibenarkan; penghakiman untuk perayu; tuntutan balas responden ditolak]

Case(s) referred to:
White & Carter (Councils) Ltd v. McGregor [1961] 3 All ER 1178 ***(dist)***

Legislation referred to:
Contracts Act 1950, s. 75

For the appellants - Neoh Poh Cheng; M/s Suhaimi Khor Zulkifli & Chang
For the respondent - Murali Achan; M/s Vijendran & Co

[Appeal from High Court, Kuala Lumpur; Suit No: S1-22-140 of 1993]

Reported by WA Sharif

JUDGMENT

Shaik Daud Ismail JCA:

I have had the opportunity of reading in draft both the judgments of YA Dato' Siti Norma bt Yaakob and YA Dato' Haji Mokhtar bin Haji Sidin and I concur with both judgments.

Siti Norma Yaakob JCA:

The cause of action in this appeal is founded on a breach of a sale and purchase agreement (the agreement) dated 15 June 1983, entered into between the appellants/plaintiffs and the respondent/defendant. There is also an Annexure and a letter dated 15 June 1983 signed by all the three parties, which they have agreed to be read together and form part of the agreement. (See ss. 2.07 and 6.02 of the agreement).

The 1st appellant is a developer and at the material time was developing the 2nd appellant's lands into a commercial centre known as Damansara Town Centre. Through the agreement, the respondent agreed to purchase 1,991.66 square feet of office space at the centre, identified as Level 7-C6 and C7 (Front Portion) at the price of RM385 per square foot which works out to RM766,789.10. Under the agreement, the 1st appellant is identified as the vendor, the 2nd appellant merely lending its name in the event it is required to effect a transfer of the office space to the respondent and when that time comes the 2nd appellant is still the registered proprietor of the property purchased. (See ss. 2.01 and 2.05 of the agreement).

It is not disputed that the respondent was only able to make the initial payments amounting to RM231,789.10 under para. (a) of the Second Schedule to the agreement and fell into arrears as regards the settlement of the balance of the purchase price.

In the court below, the appellants sued the respondent for the sum of RM634,763.99, being the loss suffered by them under the agreement following the respondent's breach. In disputing this claim, the respondent raised the following defences in the alternative.

(1) That the agreement is void and illegal as it contained provisions contravening the Moneylenders Ordinance 1951.

(2) If valid, the agreement has been repudiated on 18 February 1986 and arising from this repudiation, the appellants are only entitled to forfeit 10% of the purchase price amounting to RM76,678.91 under s. 8.01 of the agreement. That 10% should be deducted from the initial payments of RM231,789.10 and the balance refunded. The respondent claims the refundable balance of RM155,110.19 by way of a counterclaim.

The learned judge, after a trial and adjourning the matter to consider the written submissions of both parties, made the following findings.

(1) The agreement is not caught by the Moneylenders Ordinance 1951 and as such it is valid and binding.

(2) The agreement had been terminated on 18 February 1986 and at that point in time, the appellants can only forfeit 10% of the purchase price from the initial payments. To that end the appellants' claim for RM634,763.99 cannot be maintained as they had charged a total of 32% interest on the balance of the purchase price. In any event the rate of default interest imposed on the outstanding instalments is a penalty and is caught by s. 75 of the Contracts Act 1950. The appellants' claim was dismissed with costs.

(3) The counterclaim was allowed in part after due credit had been given to the default interest due on the initial payments, the default interest due on the instalment payments, the amount of the 10% purchase price and deducting their total sum from the initial payments made under the Second Schedule of the agreement, judgment was entered for the respondent for the lesser sum of RM116,738.81, interest at 12% per annum from 18 February 1986 until the date of judgment and further interest at 8% per annum from the date of judgment to the date of realisation and costs.

It is on these findings that the appeal before us is founded.

We confirm the first finding of the trial judge to have been correctly made as no loan had been granted by the appellants to the respondent to settle the balance of the purchase price. This is not disputed. It is unfortunate that the word "loan" had been included in para. (b) of the Second Schedule of the agreement when dealing with the provisions of how the balance of the purchase price of RM535,000 was to be settled by the respondent. To compound the matter further, correspondence from the appellants described the default interest due on the balance of the purchase price in various terms ranging from "interest on loan amount" to "interest payable on loan" and "loan account". However words or description, *per se*, cannot make the transaction a money lending transaction in the manner ascribed to by the respondent. In this instance, there is evidence both oral and documentary to say otherwise.

To begin with, the 1st appellant's Executive Officer, SP1, in his evidence explained that after making the initial payments totalling RM231,789.10 under para. (a) of the Second Schedule to the agreement, the respondent was not able to settle the balance of the purchase price in one lump sum. It was then agreed that payment of the balance of the purchase price be protracted over a period of ten years by way of monthly instalments of RM8,216.26 each to

take effect from 1 April 1984 and for this indulgence interest would be charged at 13% per annum on any unpaid instalment due as well as on the balance of the purchase price falling due. This arrangement is borne out by para. (b) of the Second Schedule to the agreement. SP1 also testified that at the same time the 1st appellant would endeavour to obtain funds from any financial institution to discount the balance of the purchase price. That intention is also expressed in the last sentence of s. 4.02 of the agreement in the following manner.

> The vendor reserves the right to discount the loan to the purchaser with a financier.

For completeness, I need to point out that "financier" is defined by s. 1.01 (p) of the agreement to mean a "bank, finance company, building society, insurance company or any other person, firm or corporation whose business includes the provision of finance or lending of moneys". As such the 1st appellant cannot fall within the definition and if there is any lingering doubt that the 1st appellant was to provide the loan, there is s. 5.01 of the agreement that singles out the financier to be a third party other than the 1st appellant. The particular provisions of that section read as follows:

> ... Provided in default of payments as aforesaid it shall be lawful (but not obligatory) for the Vendor or the Financier to pay all or any of such outgoings impositions on behalf of the Purchaser and thereby increase the indebtedness of the Purchaser to the Vendor or the Financier as the case may be or for the Vendor to treat such failure as a breach of contract.

Clearly the transaction involved the sale and purchase of property and had nothing to do with a money lending transaction.

As for fixing the date of termination of the agreement to be 18 February 1986, we consider that there had been a misdirection on the part of the learned judge for the fo1lowing reasons.

The rights, interests and obligations of all parties to the agreement are spelt out in the various sections ot the agreement and it is within the four corners of the agreement that such interests have to be interpreted and determined.

There is evidence that on 4 February 1986, the respondent's then solicitors, Messrs. Aziz Abdullah and Co., wrote to the appellants, the relevant paragraphs of which read as follows:

Dear Sirs

OFFICE NO. LEVEL 7 -C6 7 C7 (FRONT PORTION) DAMANSARA TOWN CENTRE

We have now been appointed by M/s Yap Han Soo & Sons Sdn Bhd of No. 44-4 Jalan Pudu Lama, Kuala Lumpur to act on its behalf in respect of the above matter. We are instructed to give you Notice, which we hereby do, that our client hereby terminates the Sale and Purchase Agreement dated 15th of June 1983 executed between you and our client.

As our client has now committed a breach of the Agreement you shall be entitled to enforce your rights under Clause 8.01 of the said Agreement. The said Clause provides that in the event of a breach of the Agreement you shall forfeit ten percentum (10%) of the purchase price and further forfeit whatever interest due in respect of late and default payments.

Take Notice that our client permits you to forfeit ten percentum (10%) of the purchase price and interest for default and late payments up to the date of receipt of this Notification.

The first question that springs to mind when considering the issue of termination is whether the agreement allows the respondent to do so. The learned judge answered that question in the negative and in this respect we are in complete agreement with him. This finding should have prompted the learned judge to hold that the purported termination is of no effect and the agreement continues to be good and binding on the respondent. In any event, there had been no acceptance by the 1st appellant of the intended termination and this is clear from the 1st appellant's letter dated 18 February 1986 written in response to the respmdent's letter and which was relied upon by the judge to fix the date of termination. This cannot be right as the 1st appellant's letter made no reference to the intended termination what more hold that it had accepted the repudiation of the agreement. Under the agreement the right to terminate is given solely to the 1st appellant as seen from s. 8.01 of the agreement, the relevant provisions of which read as follows:

Section 8.01 **Event of Default**

Nothwithstanding any provisions to the contrary in this Agreement contained, if the Purchaser shall:

(a) ...; or

(b) ...; or

(c) commit any breach of the terms and conditions contained in this Agreement; or

(d) ...; or

(e) ...;

... then and in any of the said cases, it shall be lawful for the Vendor at any time thereafter to forthwith determine the Agreement without any notice to the Purchaser ...

It was only on 16 July 1990, that the 1st appellant, through its solicitors, terminated the agreement by letter of that date, after an earlier written demand for all outstanding sums due under the agreement as at 30 June 1990 remained unpaid. It was based on this termination, which we consider to be validly exercised that the appellants had computed their loss to be RM634,763.99 as claimed in their statement of claim. It is also on this claim that we had to decide whether such loss had been incurred by the appellants as the calculation of loss computed in the court below was based on a date of termination, which we say, had been erroneously determined.

The fact of the respondent's breach is not disputed as the respondent had admitted to it in its letter dated 4 February 1986, that I had alluded to above when it gave notice of its intention to repudiate the agreement. In that same letter, the respondent was also agreeable to the 1st appellant forfeiting 10% of the purchase price and interest due in respect of late and default payments under s. 8.01 of the agreement.

The right to forfeit under s. 8.01 of the agreement can only be exercised by the 1st appellant in the following manner.

(i) Firstly, all interest in respect of late payments, if any, previously paid shall be forfeited to the Vendor;

(ii) Secondly, all interest howsoever and wheresoever, payable under this Agreement shall be paid to the Vendor;

(iii) Thirdly, a sum equivalent to ten per centum (10%) of the Purchase Price shall be paid and forfeited to the Vendor as reasonable compensation;

(iv) Lastly, the residue thereof, if any, shall be refunded to the Purchaser;

It is the interpretation of these forfeiture provisions in the agreement that has become a bone of contention between the parties, particularly the imposition of interest on the sums due.

As at 30 June 1990, the 1st appellant had computed the following sums to be forfeitable under s. 8.01.

(i) 10% of the purchase price amounting to RM76,678.91

(ii) Interest at 13% per annum on RM535,000 balance of the purchase price amounting to RM359,367.88

(iii) Default interest at 19% per annum on the outstanding instalments amounting to RM370,756.50

(iv) Maintenance charges (July 1985 to June 1990) amounting to RM59,749.80.

The respondent is not disputing item (i) as it is the agreed reasonable compensation allowed by s. 8.01 (iii) of the agreement. Likewise item (iv) as the respondent had failed to pay any service or maintenance charges under s. 5.13 of the agreement calculated at the rate of RM995.83 per month and for the relevant period of 60 months the amount due is RM59,749.80.

As for items (ii) and (iii), the principal objection raised is on the rates of interest chargeable as being excessive and a penalty under s. 75 of the Contracts Act 1950.

It is not disputed that the prescribed rate of interest under the agreement is 13% per annum. (See s. 4.02 and para. (b) of the Second Schedule to the agreement). However as the parties had made time the essence of the agreement as seen from s. 4.03, default on any payment due also attracted a penalty interest over and above the prescribed rate to be calculated from day to day at the rate of 1/2% per month or 6% per annum. Section 5.16 of the agreement has this to say with regards to the imposition of interest.

> The sums referred to in Sections 4.02, 5.01, 5.03 and 5.13 and all other payments payable by the Purchaser under this Agreement shall be paid by the Purchaser within FOURTEEN (14) DAYS from the due date and if the Purchaser shall fail, neglect and or refuse to pay such sum or any other sums due under this Agreement within the stipulated or such time as may be given by the Vendor the Purchaser shall pay to the Vendor interest on such unpaid sum at the Prescribed Rate plus a penalty rate of half percent per month to be calculated from day to day PROVIDED ALWAYS nothing herein contained shall prejudice the rights of the Vendor under Section 8.01 hereof.

It was pursuant to the provisions of the aforesaid section that the 1st appellant charged interest at 13% per annum on the balance of the purchase price and 19% per annum as default interest on the arrears of instalments, falling due on 30 June 1990.

As no part of the balance of the purchase price had been paid at all by the respondent, I cannot see how it can object to the imposition of 13% interest as that was the rate of interest agreed upon default under para. (b) of the Second Schedule. Likewise the imposition of 19% interest on the arrears of instalments as that rate of interest is allowed by s. 5.16 of the agreement. Perhaps the only issue is whether the increased interest at 19% per annum is caught by s. 75 of the Contracts Act 1950.

Section 75 of the Contracts Act 1950 is worded as follows:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> Explanation – A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

The presence of a penalty clause in a contract renders that particular clause to be unenforceable but it has no effect on the validity of the contract as a whole. In this instance, SP1 had explained that no security was provided by the respondent for the balance of the purchase price but instead goodwill and trust prevailed to enable the respondent to settle the balance by way of monthly instalments stretched over a period of ten years. For this indulgence the respondent reciprocated by agreeing to be liable to pay penalty interest over and above the 13% prescribed rate of interest for any instalment due under the agreement in the event of default.

To bring that increased or penalty interest within the ambit of s. 75, it must first be shown that it was excessive in nature. The fact that it was an agreed penalty interest as opposed to one that was fixed unilaterally by the appellants, lends support to my conclusion that it could not have been that excessive to enable the respondent to agree to that rate of interest to be charged. On that reasoning the respondent cannot now be heard to complain that the rate of 19% per annum on all instalments due as at 30 June 1990, is excessive and under those circumstances that rate of interest cannot be caught by s. 75.

I am aware that the "Explanation" to s. 75 prescribes such a promise to pay increased interest to be a penalty but I hasten to add that the language used in the "Explanation" is not mandatory in nature as the legislature preferred the word "may" as opposed to "shall". Under such circumstances I consider that every promise to pay increased interest has to be identified and evaluated before a determination can be reached whether such a promise falls within the situation as envisaged by the "Explanation" in s. 75.

As all the four items of loss claimed by the appellants in their statement of claim are deductible and forfeitable under s. 8.01 of the agreement, it follows that their claim for RM634,763.99 has been made out after due credit has been given for the total sum received as initial payments under para. (a) of the Second Schedule to the agreement. As there is no question of there being any residue left to be refunded to the respondent, it also follows that the respondent's counterclaim cannot be maintained and must be dismissed. On these findings, we had allowed the appeal with costs here and below, set aside the orders of the learned judge and entered judgment for the appellants for RM634,763.99 with interest at 8% per annum from the date of judgment to the date of realisation. The deposit was also ordered to be refunded to the appellants.

Mokhtar Sidin JCA:

This is an appeal by the appellants (plaintiffs in the court below) against the decision of the learned judge of the High Court who had dismissed their claim. The appellants by a writ dated 2 April 1991 claimed for the sum of RM634,763.99 which was said to be a loan given to the respondent.

In their statement of claim the appellants stated that by a sale and purchase agreement dated 15 June 1983 (hereinafter referred to as "the agreement") the respondent agreed to purchase from the first appellant an office block identified as Level 7 - C6 and C7 at Damansara Town Centre (hereinafter referred to as "the office block") for the sum of RM766,789.10. The respondent paid the down payment of RM231,789.10 in four instalments leaving a balance of RM535,000. This balance was to be paid in accordance with the Schedule which was by four-monthly instalments of RM8,216.26 over a period of ten years commencing from 1 April 1984 at an interest of 13% per annum. In accordance with the agreement the second appellant is entitled to vary the rate of interest. In addition to that, under cl. 5.16 of the agreement the second appellant is entitled to impose a penalty interest of half percent per month on any unpaid sum due calculated from day to day over and above the 13% interest stated above. In addition the respondent shall pay all the service charges and insurance premiums to the first appellant. The respondent failed to pay the instalments and the other charges. As of June 1990 the total amount due and payable was RM866,553.09. By a letter dated July 1990, the appellants' solicitors gave notice to terminate the agreement. Taking into consideration the sum of RM231,789.10 the amount still due at the time of the filing of the statement of claim was RM634,763.99 for which the appellants now claim with interest thereon at the rate of 8% per annum.

The respondent, in its defence dated 24 October 1991, admitted that it entered into the agreement with both appellants for the purchase of the said office block. It was also admitted by the respondent the initial payment of RM231,789.10 paid to the appellants. The respondent denied that the balance were to be paid in accordance with the Schedule. On the other hand, the respondent alleged that it was required to take a loan from the appellants to pay the balance. It was further alleged by the respondent that the appellants were not licenced moneylenders and the loan given was illegal and void. On that premise the sale and purchase was null and void. Alternatively, the respondent alleged that by a letter dated 4 February 1986 written by its previous solicitors the sale and purchase agreement was repudiated by the respondent and this was accepted by the appellants through their letter dated 18 February 1986. Further, the respondent alleged that by the letter dated 18 February 1986, the appellants had wrongly claimed the sum of RM240,488.30 which sum exceeded the initial payment of RM8,699.20. Respondent contended that the appellants were not entitled to that claim and to forfeit the whole initial payment. It was further contended by the respondent that the appellants were entitled to forfeit only the sum of RM76,678.91 which was equivalent to 10% of the purchase price. As a result of the above, the respondent made a counterclaim for the refund of the RM231,789.10 (the initial payment) or alternatively the refund of the balance of the initial payment after deducting the sum of RM76,678.91 which was in the sum of RM155,110.19.

The appellants in their reply denied that the balance of the purchase price was a loan. The appellants in their reply stated that the respondent was not able to pay the balance of the purchase price in one lump sum, the respondent was allowed to pay the balance by instalments in accordance with the Schedule. In view of that facility being given to the respondent, it was agreed that the respondent pay interest for that facility at the rate of 13% per annum. As to the repudiation, appellants stated that they did receive the letter dated 4 February 1986 but denied that they accepted the repudiation. It was further stated by the appellants that their letter dated 18 February 1986 was a demand letter to the respondent demanding the payment of the arrears of unpaid instalments as on that date.

In his judgment, the learned trial judge posed the following four questions for his consideration and determination:

(1) whether the transaction is one of loan;

(2) whether the agreement was terminated on 4 February 1986;

(3) if so, whether the appellant's computation was correct;

(4) If the answer to issue (2) is in the negative, whether the appellants were entitled to the same as claimed.

On issue No. 1, the learned judge found that the transaction was not a loan but an agreement for the sale and purchase of a property. He found that no money was lent to the respondent and that the respondent was favoured with the opportunity to postpone the payment of the balance of the purchase price without any security. As to issue No. 2, the learned judge found that the respondent had the right to terminate the agreement. He was of the opinion that the effective date of termination was not on 8 February 1986, the date when the former solicitors for the respondent wrote the letter but on 18 February 1986, the date when the appellants replied. The learned judge also found that the letter dated 18 February 1986 by the appellants did not state their acceptance or refusal of the respondent's offer to repudiate the agreement in the letter dated 8 February 1986. On issue No. 3, the learned judge found that the computation given by the appellants in their letter dated 18 February 1986 was wrong. He found that as a matter of calculation on the computation given by the appellants, the appellants were claiming and imposing interest at the rate of 32% per annum on the balance of the purchase money remained unpaid. The learned judge was of the view that the extra 13% interest imposed by the appellants was caught by s. 75 of the Contracts Act 1950 and as such the appellants were not entitled to impose the extra 13% interest. Since his finding on issue No. 2 was in the affirmative, the learned judge did not decide on issue No. 4.

In view of his findings as stated above, the learned judge allowed the appellants' claim only in the sum of RM115,050.20 which was to be deducted from the initial payment sum of RM231,789.10. He then ordered the balance sum of RM116,738.81 be paid to the respondent as respondent's counterclaim. The learned judge then dismissed the appellants' claim with costs and allowed the respondent's counterclaim with costs. (We note that the amount calculated by the learned judge was wrong since there is still the sum of 9 sen not accounted for).

Being dissatisfied with the decision of the learned judge the appellants appealed. We have noted that the respondent did not appeal against that decision even though the refund given by the learned judge was less than the amount it had counterclaimed.

As to the first issue decided by the learned judge, we are of the view that the learned judge came to the correct conclusion when he found that this was not a loan. We agreed with him and the reasons given by him that the transaction was not a loan.

Before us it was contended by the appellants that the learned judge had erred when he concluded that the agreement was terminated on 18 February 1986. Appellants conceded that they received the letter dated 4 February 1986 from the former solicitors for the respondent requesting the appellants to repudiate the sale and purchase agreement for breach committed by the respondent. It was the contention of the appellants that the reply dated 18 February 1986 was not an acceptance of the repudiation nor was it a termination letter. It was submitted that the letter was nothing more than a statement or the computation of the amount still due under the agreement to which the respondent must pay. At the most the reply was a conditional acceptance or a new offer to the respondent that the request by the respondent for the appellants to repudiate the agreement if the respondent paid the additional sum of RM8,699.20 which was still due. For the purpose of clarity the relevant parts of the letter dated 4 February 1986 read as follows:

> We are instructed to give you Notice, which we hereby do, that our client hereby terminates the Sale and Purchase Agreement dated 15th of June 1983 executed between you and our client.
>
> As our client has now committed a breach of the Agreement you shall be entitled to enforce your rights under Clause 8.01 of the said Agreement. The said Clause provides that in the event of a breach of the Agreement you shall forfeit ten percentum (10%) of the purchase price and further forfeit whatever interest due in respect of late and default payments.
>
> Take Notice that our client permits you to forfeit ten percentum (10%) of the purchase price and interest for default and late payments up to the date of receipt of this Notification.
>
> Further take Notice that you are not to charge any further interest in respect of late payments or any other interest whatsoever as from the date of receipt of this notification.
>
> Todate our client has paid to you a sum of M$231,789.09 the breakdown of which is as follows:
>
> Payment *vide* your receipt dated
>
> 1. 15.6.83 – M$ 77,500.00
> 2. 21.9.83 – M$ 76,678.91
> 3. 27.3.84 – M$ 38,805.09
> 4. 24.4.84 – M$ 38,805.09
>
> M$231,789.09

In the circumstances, could you please forward to us as Solicitors for our client the balance of the purchase price in your possession after the necessary deductions.

Take Notice that unless the balance of the purchase price after the deductions is paid to us within fourteen (14) days from date of receipt of this notification, our client would charge on the same interest rates charged by you to our client and shall further commence legal proceedings to recover the same.

The relevant parts of the reply dated 18 February 1986 by the appellants read as follows:

The amount payable by Messrs Yap Han Soo & Sons Sdn Bhd up to 6th February 1986 is as follows:

Default interest on downpayments	$ 4,686.38
Default interest on instalment payments	33,169.44
Interest on Loan amount	125,953.57
10% of Purchase Price	76,678.91
	$ 240,488.30
Amount paid by Messrs Yap Han Soo & Sons Sdn Bhd	$ 231,789.10
Amount owing to us by Messrs Yap Han Soo & Sons Sdn Bhd	$ 8,699.20

Kindly let us have payment for the amount of $8,699.20 within seven (7) days from date of this letter.

In order to determine whether these letters effectively terminated the agreement as concluded by the learned judge, we have to view those letters in the light of the agreement. The relevant provisions of agreement in respect of the termination are found in ss. 4.03, 5.16 and 8.01 which are as follows:

Section 4.03 **Time of the Essence of This Agreement**

Time shall be the essence of this Agreement in relation to all the provisions of this Agreement as shall relate to the payment of any instalment of the Purchase Price or any part thereof.

Section 5.16 **Time for payment and imposition of interest**

The sums referred to in Sections 4.02, 5.01, 5.03 and 5.13 and all other payments payable by the Purchaser under this Agreement shall be paid by the Purchaser within FOURTEEN (14) DAYS from the due date and if the Purchaser shall fail, neglect and or refuse to pay such sum or any other sums

a due under this Agreement within the stipulated or such time as may be given by the Vendor the Purchaser shall pay to the Vendor interest on such unpaid sum at the Prescribed Rate plus a penalty rate of half percent per month to be calculated from day to day PROVIDED ALWAYS nothing herein contained shall prejudice the rights of the Vendor under Section 8.01 hereof.

b Section 8.01 **Event of Default**

Notwithstanding any provisions to the contrary in this Agreement contained, if the Purchaser shall:

(a) fall to pay the Purchase Price or any part thereof in accordance with
c Section 4.02 aforesaid; or

(b) fall to pay the Service Charges or any part thereof or any of the sum or sums or part thereof payable by the Purchaser in this Agreement; or

(c) commit any breach of the terms and conditions contained in this
d Agreement; or

(d) before payment in full of the Purchase Price commit an act of bankruptcy or enter into any composition or arrangement with his creditors or being a company enter into liquidation whether compulsory or voluntary; or

(e) if any execution be levied upon the Purchaser or his goods;

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then and in any of the said cases, it shall be lawful for the Vendor at any time thereafter to forthwith determine the Agreement without any notice to the Purchaser and thereupon the Agreement shall be null and void and of no effect save and except that the Purchaser and all those claiming title under him shall forthwith vacate the Parcel, if possession has been delivered and the Vendor
f shall be entitled to deal with or otherwise dispose of the Parcel in such manner as the Vendor shall see fit as if the Agreement had not been entered into. All monies previously paid by the Purchaser to the Vendor shall be dealt with and disposed off as follows:

(i) Firstly, all interest in respect of late payments, if any, previously paid
g shall be forfeited to the Vendor;

(ii) Secondly, all interest howsoever and wheresoever payable under this Agreement shall be paid to the Vendor;

(iii) Thirdly, a sum equivalent to ten per centum (10%) of the Purchase Price
h shall be paid and forfeited to the Vendor as reasonable compensation;

(iv) Lastly, the residue thereof, if any, shall be refunded to the Purchaser;

and neither party hereto shall have any further claims against the other for cost, damages or compensation or otherwise thereafter.

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Section 8.02 **Vendor not to have condoned Purchaser's Default**

Notwithstanding that the Vendor may not have exercised any of the remedies available immediately on default by the Purchaser or that the Vendor may have accepted monies from the Purchaser after such default the Vendor shall not be held to have condoned or acquiesced in such default and may at any time thereafter exercise all or any of the remedies available to it and any delay on its part in taking steps to enforce the remedies conferred on or available to it by this Agreement or any statute shall not be held to prejudice its right of action in respect thereof.

From the facts it is clear to us that defaults were committed by the respondent when they failed to pay the instalments stipulated by the agreement. There was no fault on the appellants. In such a case under the agreement only the appellants have the right to terminate the agreement. We believe that the respondent acknowledged this when the respondent wrote the letter dated 4 February 1986 (second paragraph of the letter) where it admitted committing a breach of the agreement. The respondent then invited or requested the appellants to exercise their rights to terminate the agreement. It is obvious to us from the reply that the appellants did not accept the invitation or the request to terminate the agreement. As we have stated earlier at the most the reply conveyed a conditional acceptance or a counter offer by that they would accept the offer to terminate on payment of RM8,699.20. The respondent could not force the appellants to exercise their right to terminate the agreement. Under the agreement the discretion to terminate or not to terminate the agreement for the breach by the respondent rests solely with the appellants. The learned judge was right when he said that the respondent had no right to terminate the agreement. But then he erred when he held that the respondent has the right to repudiate the agreement. To support his view the learned judge cited the case of *White & Carter (Councils) Ltd. v. McGregor* [1961] 3 All ER 1178.

With the greatest respect to the learned judge, we are of the view that the case cited did not support his conclusion. In that case the House of Lords held:

If one party to a contract wrongfully repudiates it and the other party does not accept the repudiation, the contract survives and the rights of the innocent party are preserved; accordingly he can perform part of his contract and can recover on that footing, for there is no duty on him to vary the contract at the behest of the other party so as to deprive himself of its benefit.

In that case the situation was worse because the contract was entered by the respondent's sales manager, without specific authority from the respondent, and as soon as the respondent discovered it, he gave notice to cancel the contract on the same day. The termination was held to be unlawful and the appellant

was entitled to payments under the contract. In the present appeal it is clear to us that the respondent has no right to repudiate the agreement and as the appellants did not accept the repudiation the agreement survived. That being the case the appellants were entitled to the sums due under the agreement at the time they terminated the agreement. We are of the view that the learned judge erred when he held that the agreement was terminated on 18 February 1986. We are of the view that the apellants' rights under s. 8.01 and 8.02 of the agreement were preserved. The agreement was only terminated on 16 July 1990 when the appellants' solicitors gave notice to terminate the agreement for the breach committed by the respondent. As such the appellants were entitled to all the sums due under the agreement from the respondent as of 16 July 1990. This is precisely the claim by the appellants in their statement of claim.

From the statement of defence the respondent challenged only the appellants' entitlement to that sum. The computation of the claim by the appellants was made known to the respondent through the letter of demand dated 6 July 1990 where it was shown the computation of the amount due until 30 June 1990. The computation was not challenged by the respondent and found in the supplementary agreed bundle of documents. We have seen the computation and found that the sums claimed by the appellants were those they were entitled to under the agreement for any breach committed by the respondent.

Since we are not with the learned judge on the date of termination it is obvious that the computation prepared by him upon which he gave judgment for the respondent was not sustainable. We note that when he did the computation he relied on s. 75 of the Contracts Act 1950 and the equitable principle. Section 75 provides as follows:

> 75 Compensation for breach of contract where penalty stipulated for.
>
> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> Explanation – A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

The learned judge concluded that the extra 13% imposed on the balance of the purchase price during that duration was a penalty and is caught by s. 75. Again, with the greatest respect to the learned judge, we found that he had erred in his application of s. 75. It is clear to us that the agreement provided for penalty to be imposed for any breach committed by the respondent.

There is no doubt in our minds that the extra 13% on the balance of the purchase was the penalty to be imposed. Section 8.01 of the agreement provided for such imposition and this was agreed upon by the parties. The respondent knew of the penalty clause when it signed the agreement. The amount claimed by the appellants for penalty did not exceed the amount provided for by the agreement. Section 27 allowed the appellants to claim for such an amount without any proof of damages suffered by the appellants. For that reason we found the judge had erred in his computation when he rejected the appellants' claim for penalty. The appellants were entitled to impose the penalty until the date of termination.

For the above reasons we allowed the appeal by the appellants with costs here and the court below. The order of the learned judge is set aside. Judgment is hereby entered for the appellants for the sum as claimed by them in cl. 10 of their statement of claim. The counterclaim by the respondent in its statement of defence is hereby dismissed with costs. The deposit is to be refunded to the appellants.

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